

Calendar No. 982

91ST CONGRESS }
2d Session }

SENATE

} REPORT
No. 91-978

ROSEANNE JONES

JUNE 26, 1970.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 2047]

The Committee on the Judiciary, to which was referred the bill (H.R. 2047) for the relief of Roseanne Jones, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The proposed legislation would confer jurisdiction on the U.S. District Court for the Southern District of California, Southern Division, notwithstanding the limitations of section 2401 of title 28, United States Code, or any other statute of limitations, laches, or lapse of time, to hear, determine, and render judgment upon the claims of Roseanne Jones, a minor, against the United States based on injuries and disability suffered as the result of an operation performed upon her at the U.S. Naval Hospital at San Diego in 1959.

STATEMENT

In its favorable report on the proposed legislation, the House Judiciary Committee set forth the facts of the case as follows:

The Department of the Navy in its report to the committee on the bill defers to the Department of Justice and the Department of Justice indicated that it would have no objection to the bills enactment.

Roseanne Jones, the daughter of a Navy seaman, was operated on for a tumor of the skull in the U.S. Naval Hospital, San Diego, Calif., on January 28, 1959. In March of that year

an examination of the child by an ophthalmologist disclosed that she was suffering with a type of blindness. On October 30, 1964, her blindness was diagnosed as permanent.

On April 13, 1965, Roseanne Jones, through her guardian ad litem, the U.S. National Bank, filed an action against the Government under the Federal Tort Claims Act in the U.S. District Court for the Southern District of California. The complaint alleged negligence in her care and treatment at the U.S. Naval Hospital, San Diego, commencing on January 28, 1959. It further alleged that the minor plaintiff and her parents were advised by the Government medical personnel that her loss of vision would be temporary, and that the plaintiff had no reason to believe otherwise until advised of the October 1964 diagnosis.

On May 8, 1967, the litigation was dismissed on motion by the Government based upon the plaintiff's failure to prosecute their claim. The files of the Department of Justice indicate that plaintiff's counsel did not oppose the motion because, in his opinion, a review of the facts and law indicated the case was barred by the applicable statute of limitations.

The committee feels that this is an important factor in this case because it is readily apparent that the rights of the minor child may have been prejudiced by this failure to pursue the action. In this connection, the committee notes that the Department of Justice in its report to the committee stated that it is that Department's view that there is some question as to whether the claim filed as outlined above of Roseanne Jones was barred by the statute of limitations.

The Department of Justice report contains a reference to several court decisions concerning the running of the statute of limitations in situations which the Department of Justice feels are parallel to those existing in the *Roseanne Jones* case. In this connection, the Department stated:

"The statute of limitations applicable to this action provides that a tort claim against the United States is barred unless brought within 2 years from the time the claim accrues (28 U.S.C. 2401(b)). In an action based upon alleged medical malpractice it has been held that a claim accrues when plaintiff knew, or in the exercise of reasonable diligence should have known, of the acts of negligence upon which the claim is based (*Quinton v. United States*, 192 F. Supp. 581, rev'd 304 F. 2d 234 (C.A. 5, 1962); *Hungerford v. United States*, 307 F. 2d 99 (C.A. 9, 1962)). In the instant action it appears clear that the parents of the minor plaintiff were aware of all of the facts and circumstances of her injuries, except their permanent nature, by 1960. This would not seem to be sufficient to toll the operation of the statute of limitations to allow filing of this action subsequent to 1962 (*Brown v. United States*, 353 F. 2d 578 (C.A. 9, 1965)). In the *Brown* case the court found that the parents of the minor plaintiff, more than 2 years prior to the institution of suit, were informed as to the exact nature of the disability of the minor plaintiff and its relationship

to prior medical treatment. Based upon this finding the appellate court was of the view that the parents had knowledge sufficient to alert a reasonable person that there may have been negligence related to the injuries for which the complaint was subsequently made.

"An unreported opinion, filed in February of 1968, in the case of *Tracy Louise Condon v. United States* by Judge James M. Carter, District Court for the Southern District of California, raises some doubt as to whether the action of the present claimant was in fact barred by the statute of limitations. In the *Condon* case the court distinguished the *Brown* decision and held, in effect, that there must be actual notice of the specific acts of negligence before a claim for malpractice will accrue under the Federal Tort Claims Act. In the *Condon* case the minor plaintiff was born at North Island Naval Hospital in 1951. Due to an incompatibility in Rh factors between her mother and father she suffered erythroblastosis at birth. The court found that the Government's physicians failed to properly treat this condition, which failure resulted in permanent injuries to the child including cerebral palsy and deafness. The Government raised the issue of statute of limitations since the evidence established that the parents were aware of the child's injuries and the causal connection between those injuries and the Rh incompatibility more than 2 years prior to the filing of their action in 1962. The court refused to accept this defense, stating:

"The causes of Tracy's condition were very complicated. Because of the limited medical understanding of the parents, they were unable to comprehend the nature of the negligence which brought about this condition without some expert assistance. It is clear that even though the parents knew a great deal about the Rh incompatibility, neither one had knowledge which would put them on inquiry regarding the treatment administered to Tracy after her birth.

"Mr. and Mrs. Condon knew of the child's disability and knew it was in some way connected with the Rh positive and negative factors of the parents. They knew Tracy was born jaundiced but previous children had been born jaundiced.

"Mrs. Condon was told that Tracy had brain damage but was not told of any acts of negligence. The doctor who examined Tracy for deafness in 1955 never explained the cause of such deafness.

"There was no notice to Mr. and Mrs. Condon of any of the acts of negligence found by the court nor would a person in Mrs. Condon's situation have reason to inquire whether these acts of negligence existed * * *."

"Using the test of the *Condon* decision it may be argued that the parents of the minor plaintiff in this case likewise did not have sufficient knowledge of any acts of negligence so as to begin the running of the statute of limitations prior to 1964."

After outlining the law and commenting as quoted above,

the Department of Justice stated that while it is generally opposed to legislative waiving statute of limitations on policy grounds in the absence of extenuating circumstances, the facts of this case are such that it may be a situation in which a legislative waiver of the statute of limitations would be warranted. The committee has carefully reviewed the facts of the case and the law as outlined by the Department and has concluded that in fact this is a case in which such a waiver should be granted. Accordingly it is recommended that the bill be considered favorably.

The committee, after a review of the foregoing, concurs in the action taken by the House of Representatives and recommends favorable consideration of H.R. 2047, without amendment.

Attached hereto and made a part hereof is a letter dated November 28, 1969, from the Attorney General and a letter dated November 28, 1969, from the Department of the Navy.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., November 28, 1969.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 2047, a bill for the relief of Roseanne Jones.

H.R. 2047 would confer jurisdiction upon the U.S. District Court for the Southern District of California to hear, determine, and render judgment upon the claims of Roseanne Jones against the United States notwithstanding the period of limitations prescribed in section 2401 of title 28, United States Code, or any other period of limitations.

The files of this Department indicate that Roseanne Jones, the daughter of a Navy seaman, was operated on for a tumor of the skull in the U.S. Naval Hospital, San Diego, Calif., on January 28, 1959. In March of that year an examination of the child by an ophthalmologist disclosed that she was suffering with a type of blindness. On October 30, 1964, her blindness was diagnosed as permanent.

On April 13, 1965, Roseanne Jones, through her guardian ad litem, the U.S. National Bank, filed an action against the Government under the Federal Tort Claims Act in the U.S. District Court for the Southern District of California. The complaint alleged negligence in her care and treatment at the U.S. Naval Hospital, San Diego, commencing on January 28, 1959. It further alleged that the minor plaintiff and her parents were advised by the Government medical personnel that her loss of vision would be temporary, and that the plaintiff had no reason to believe otherwise until advised of the October 1964 diagnosis.

On May 8, 1967, the litigation was dismissed on motion by the Government based upon the plaintiffs' failure to prosecute their claim. Our files indicate that plaintiffs' counsel did not oppose the motion because, in his opinion, a review of the facts and law indicated the case was barred by the applicable statute of limitations.

It is the view of this Department that there is some question as to whether the claim of Roseanne Jones was barred by the statute of limitations.

The statute of limitations applicable to this action provides that a tort claim against the United States is barred unless brought within 2 years from the time the claim accrues (28 U.S.C. 2401(b)). In an action based upon alleged medical malpractice it has been held that a claim accrues when plaintiff knew, or in the exercise of reasonable diligence should have known, of the acts of negligence upon which the claim is based (*Quinton v. United States*, 192 F. Supp. 581, rev'd 304 F. 2d 234 (C.A. 5, 1962); *Hungerford v. United States*, 307 F. 2d 99 (C.A. 9, 1962)). In the instant action it appears clear that the parents of the minor plaintiff were aware of all of the facts and circumstances of her injuries, except their permanent nature, by 1960.

This would not seem to be sufficient to toll the operation of the statute of limitations to allow filing of this action subsequent to 1962 (*Brown v. United States*, 353 F. 2d 578 (C.A. 9, 1965)). In the *Brown* case the court found that the parents of the minor plaintiff, more than 2 years prior to the institution of suit, were informed as to the exact nature of the disability of the minor plaintiff and its relationship to prior medical treatment. Based upon this finding the appellate court was of the view that the parents had knowledge sufficient to alert a reasonable person that there may have been negligence related to the injuries for which the complaint was subsequently made.

An unreported opinion, filed in February of 1968, in the case of *Tracy Louise Condon v. United States* by Judge James M. Carter, District Court for the Southern District of California, raises some doubt as to whether the action of the present claimant was in fact barred by the statute of limitations. In the *Condon* case the court distinguished the *Brown* decision and held, in effect that there must be actual notice of the specific acts of negligence before a claim for malpractice will accrue under the Federal Tort Claims Act. In the *Condon* case the minor plaintiff was born at North Island Naval Hospital in 1951. Due to an incompatibility in Rh factors between her mother and father she suffered erythroblastosis at birth. The court found that the Government's physicians failed to properly treat this condition, which failure resulted in permanent injuries to the child including cerebral palsy and deafness. The Government raised the issue of statute of limitations since the evidence established that the parents were aware of the child's injuries and the causal connection between those injuries and the Rh incompatibility more than 2 years prior to the filing of their action in 1962. The court refused to accept this defense, stating:

"The causes of Tracy's condition were very complicated. Because of the limited medical understanding of the parents, they were unable to comprehend the nature of the negligence which brought about this condition without some expert assistance. It is clear that even though the parents knew a great deal about the Rh incompatibility, neither one had knowledge which would put them on inquiry regarding the treatment administered to Tracy after her birth.

"Mr. and Mrs. Condon knew of the child's disability and knew it was in some way connected with the Rh positive and negative factors of the parents. They knew Tracy was born jaundiced but previous children had been born jaundiced.

"Mrs. Condon was told that Tracy had brain damage but was not told of any acts of negligence. The doctor who examined Tracy for deafness in 1955 never explained the cause of such deafness.

"There was no notice to Mr. and Mrs. Condon of any of the acts of negligence found by the court nor would a person in Mrs. Condon's situation have reason to inquire whether these acts of negligence existed * * *."

Using the test of the *Condon* decision it may be argued that the parents of the minor plaintiff in this case likewise did not have sufficient knowledge of any acts of negligence so as to begin the running of the statute of limitations prior to 1964.

The Department of Justice is generally opposed to legislation waiving statutes of limitations. Such legislation is preferential and discriminatory and should not be enacted, in our judgment, in the absence of particularly extenuating circumstances. The facts of the case of the present claimant suggest, however, that this may be a situation in which a legislative waiver of the statute of limitations would be warranted.

In view of the foregoing the Department of Justice has no objection to enactment of this legislation.

The Bureau of the Budget advises that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

DEPARTMENT OF THE NAVY,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., November 28, 1969.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your letter of January 23, 1969, to the Secretary of the Navy requesting comment on H.R. 2047, a bill for the relief of Roseanne Jones.

This bill would, notwithstanding any statute of limitation, confer upon the U.S. District Court for the Southern District of California jurisdiction to hear, determine and render judgment upon any claims of Roseanne Jones, a minor, of San Diego, Calif., against the United States, based on injuries and disabilities resulting from an operation performed upon her at the U.S. Naval Hospital in San Diego in 1959.

The records of this Department indicate that Roseanne Jones, who was 6 years old at the time and the dependent daughter of Chief Gunner's Mate Carl D. Jones, was admitted to the U.S. Naval Hospital, San Diego, Calif., on January 22, 1959, with the diagnosis of "osteoma, skull." A complete history and physical examination at the time of admission was essentially negative except for a 1-year history of boney prominence in the right frontal area associated with occasional headaches. On January 28, 1959, a right frontal osteoma was removed by surgery and replaced with a plastic plate.

The immediate postoperative course was considered satisfactory. However, on February 8, 1959, it was noted that the plastic plate was slipping and on March 2, 1959, consultation of an ophthalmologist was obtained because of questionable ability to see. The ophthalmologist was of the impression that the child exhibited "optic radiation cortical type blindness, probably secondary to cerebral edema." He also was of the opinion that this might not be permanent.

On March 13, 1959, the plastic plate was reaffixed, and again the postoperative course was uneventful. The patient was discharged from the hospital on April 8, 1959, with instructions for an eye appointment in 1 month. Hospital outpatient records of that period could not be located, except that there is a record of examination by an ophthalmological resident on October 30, 1964, who found the patient to have "optic atrophy bilateral."

Statements of specialists indicate they are unable to definitely pinpoint the etiology of the blindness. They are unaware of any negligence or lack of care during surgery or in the period prior to and after surgery. As noted above, the ophthalmologist examining the child in 1959 felt that the blindness might have resulted from "cerebral edema" and also felt at the time that the blindness might be of a temporary nature.

With specific reference to H.R. 2047, suit under the Federal Tort Claims Act (28 U.S.C. 1346(b)) was filed on behalf of Roseanne Jones against the United States in the U.S. District Court for the Southern District of California on April 13, 1965. On May 18, 1967, the Judge Advocate General of the Navy was notified that the action had been dismissed under rule 41(b) of the Federal Rules of Civil Procedure for failure of the plaintiff to prosecute. The bar of the 2-year statute of limitations on tort claims against the United States (28 U.S.C. 2401(b)) was, of course, apparent on the face of the complaint, since the cause of action, if any, had arisen 6 years before the complaint was filed.

The Department of the Navy is generally opposed to legislation waiving statutes of limitation since such legislation is preferential and discriminatory in nature. We understand, however, that the Department of Justice is of the view that the facts and circumstances in this case may warrant legislative waiver of the statute of limitations. In view of that Department's responsibilities should the bill be enacted, the Department of the Navy defers to the Department of Justice as to the desirability of enacting H.R. 2047.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely yours,

JOHN D. H. KANE, JR.,
Captain, U.S. Navy, Deputy Chief
 (For the Secretary of the Navy.)

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